

**SUMMARY AND RESPONSE TO WRITTEN AND ORAL COMMENTS
RECEIVED DURING THE NOTICE PERIOD OF SEPTEMBER 10, 2010
THROUGH OCTOBER 25, 2010 AND AT THE PUBLIC HEARING HELD
OCTOBER 25, 2010**

Comments of Steven H. Weinstein and Spencer Kook on behalf of Mercury Insurance Company, Mercury Casualty Company, and California Automobile Insurance Company
(The oral comments and written comments essentially repeat each other. The order of presentation and the cites below follow the written comments)

Comment

Introductory comments (p. 2, lines 1-19)

Response

This portion of the comment either expresses support for, or is not specifically directed at, the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Comment

The proposed amendment violates Government Code section 11349.1's requirement that regulations be necessary, authorized, consistent and clear. (p. 2, line 20 through p. 3, line 3)

Response

The Department disagrees with the comment. The full text of the comment offers no analysis or explanation of how or why the proposed amendment violates the necessity standard. The Department has provided in the Notice and the Initial Statement of Reasons why the proposed amendment is necessary and therefore disagrees with the comment insofar as it alleges noncompliance with the necessity standard. Although the Department believed that the regulation at issue was not objectively ambiguous, the proposed amendment ensures that the noncompliance procedural regulations are interpreted consistently from bench officer to bench officer by providing increased clarity and removing potential subjective ambiguity. The full text of the comment offers no analysis or explanation of how or why the proposed amendment violates the authority standard. The Department's authority is addressed in the Notice and the Initial Statement of Reasons. The proposed amendment does not alter, amend, enlarge or impair the scope of power conferred upon it in Government Code section 11400.20 and the Department therefore disagrees with the comment insofar as it alleges noncompliance with the authority standard. The proposed amendment makes technical procedural changes to existing procedural regulations and will be easily understood by those persons directly affected by them. The proposed amendment also does not conflict with existing law. The clarity and consistency standards are addressed in more detailed comments and responses below.

Comment

The proposed amendment violates Government Code section 11425.20(a)(2)'s mandate of a fair hearing. The proposed amendment also violates the procedural due process requirement found in the U.S. Constitution's 14th Amendment. The APA's mandate of a "fair hearing" and the 14th Amendment's requirement of Due Process both apply to the noncompliance hearings at issue and require the Department to present its case before the respondent presents its case. Further, the Department's existing regulations give the Department the burden of presenting its evidence and witnesses first. (10 C.C.R. § 2614.6(b).) The proposed amendment will allow the Department to forego offering prepared written testimony for certain witnesses which will mean those witnesses will testify in the proceeding after the respondent has offered its prepared written testimony. This will mean the Department will get to see all of the respondent's evidence while withholding some of its own until later. This creates an unfair surprise. (p. 3, line 4 through p. 4, line 20)

Response

The Department disagrees with the comment. The procedures for noncompliance hearings found in Title 10 CCR Chapter 5, Subchapter 4.3, Article 1, beginning at § 2614, as currently exists *and* as proposed to be amended, zealously safeguard due process fairness for all parties. California rulemaking law under the Government Code's Administrative Procedure Act, includes an "Administrative Adjudication Bill of Rights." (Government Code, Title 2, Division 3, Part 1, Chapter 4.5, Article 6.) Section 11425.10 within this "Bill of Rights" sets forth the minimum due process requirements that must be satisfied when an agency conducts an adjudicative proceeding. It includes nine requirements: (1) notice and an opportunity to be heard, including the opportunity to present and rebut evidence; (2) a copy of the governing procedure; (3) open to the public; (4) separate investigative and adjudicative functions; (5) ALJ subject to disqualification for bias; (6) written decision supported by the record; (7) restricted precedential decisions; (8) restricted ex parte communications; and (9) language assistance shall be available. The Department's procedures for noncompliance hearings, both existing and as proposed, fully comply with these minimum requirements. Indeed, the commenter does not propose that any of these minimum requirements are violated.

Regarding the comment's allegation of "unfair surprise," the Department also disagrees. In noncompliance hearings it is the respondent's acts that are at issue and the Department is the investigating party. In most cases the witness is at far greater disposal to the respondent than to the Department. Thus, the evidentiary testimony at issue is just as available to the respondent as the Department, *if not more so*.

Furthermore, all issues and all evidence, including witnesses, are shared before the evidentiary hearing. Parties attend conferences before and during hearings. (2614.1(a).) The Department provides respondent with a written notice which states in what manner and to what extent noncompliance is alleged to exist. (2614.2(a).) Respondent is afforded the opportunity to prepare a defense to any new charges. (2614.3.) Respondent is entitled to obtain the name and address of witnesses prior to hearing. (2614.8(a).) Respondent is entitled to statements of witnesses prior to hearing. (2614.8(a)(2).) Respondent is entitled to all relevant and admissible documents and reports prior to

hearing. (2614.8(a)(3),(4).) Upon ruling of the ALJ the respondent is entitled, before hearing, to a clarification of issues, a ruling on the identity and limitation of the number of witnesses, to an exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing. (2614.10.) Respondent is entitled to an exchange of information concerning witnesses – including a list setting forth the name of any person who will be offering testimony and a narrative statement of the general substance of the testimony each witness is expected to give. (2614.11.) Respondent is entitled to present additional direct testimony at the evidentiary hearing. (2614.14.) Respondent is entitled to present rebuttal testimony at the evidentiary hearing. (2614.15.) Respondent is entitled to call and examine witnesses; introduce exhibits; cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; impeach any witness regardless of which party first called him or her; and rebut evidence against him or her. (2614.17(b).) And finally, respondent is entitled to request the ALJ to limit oral testimony and to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (2614.17(f).) All of these existing procedures ensure full disclosure of the issues and evidence, including witnesses, and are not proposed to be amended. Thus, procedural Due Process and fairness is well preserved.

Consistency with 2614.6(b) is addressed in separate comment and response below.

Comment

The comment provides background regarding an existing noncompliance hearing which is referred to in the Initial Statement of Reasons. (p. 4, line 21 through p. 7 line 13)

Response

This portion of the comment either expresses support for, or is not specifically directed at, the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Comment

The proposed amendment to section 2614.13 is inconsistent with the goals of that section. The goals are to expedite hearings by providing a period for prehearing evaluation of complex testimony. If the Department does not present prepared written testimony of a witness, this ability is lost. (p. 7, line 15 through p. 8, line 1)

Response

The Department disagrees with the comment. As presented in the Initial Statement of Reasons, attempting to obtain voluntary prehearing written testimony, signed under penalty of perjury, from adverse witnesses or other witnesses not under the control of a party, is an exercise in futility. Section 2614.13 always contemplated presenting one's own witnesses' extensive testimony, especially expert witnesses who may present complicated actuarial or other ratemaking testimony. This goal is preserved. The proposed amendment furthers the purpose of the existing regulation by clarifying that Prepared Testimony is to be employed only when useful. The purpose and goals of section 2614.13 are not served by engaging in a wasteful and inefficient exercise. An adverse witness either wouldn't have, or would be reluctant to provide, in sworn prepared written format, the testimony which would lend itself to beneficial consideration

otherwise not present in oral format. The witness, of course, remains at disposal to the respondent before hearing. While at the same time, the testimony would continue to be more readily elicited in the existing prehearing conferences, clarification of issues, briefs, exhibitions, narrative statements of testimony, oral evidence at hearing, additional direct testimony, or rebuttal testimony – all of which exist in the current regulatory scheme and continue to exist untouched by the proposed amendment. The regulation at issue contemplates technical and/or complex testimony coming from parties' expert witnesses, which is unaffected by, and thus consistent with, the proposed amendment.

Comment

The proposed amendment will cause delay in the overall hearing process because motions to strike, which would have otherwise been resolved prior to hearing, would have to be entertained in the midst of the hearing. (p. 8, lines 1-3)

Response

The Department agrees that, for some potential witnesses, motions to strike oral testimony will be entertained during the evidentiary hearing. However, the Department disagrees that the proposed amendment will delay the proceeding overall. In fact, the proposed amendment clarifies that prepared testimony is not required in cases where the effort to produce it is greatly outweighed by any utility it would provide. The Department disagrees with the assertion that entertaining oral motions to strike oral testimony rather than entertaining written motions to strike written testimony would cause unreasonable delay. It would in fact expedite the proceeding.

Comment

There will be delay since “the parties will be entitled to submit rebuttal testimony in response to direct testimony submitted for the first time at hearing at a time later than would be practically possible if such direct testimony were submitted prior to hearing.” (p. 8, lines 3-6)

Response

The Department disagrees. The proposed amendment does not affect the “Rebuttal Testimony” regulation. (10 C.C.R § 2614.14.15) and will not delay the proceeding. Submitting rebuttal testimony in response to oral testimony will not delay the hearing any more than submitting rebuttal testimony in response to written testimony. Section 2614.13(c) expressly contemplates oral motions to strike rebuttal prepared testimony. Further, the noncompliance hearings procedural regulations provide the ALJ with ample discretion to control the course of the proceedings. (See generally §§ 2614.1(a); 2614.1(b); 2614.4; 2614.5; 2614.10; 2614.11; 2614.13; 2614.17(f); 2614.19; and 2614.21)

Comment

The proposed amendment conflicts with the statutory “probable cause” requirement found in Insurance Code section 1858.01 because “the CDI can now simply make out his prima facie case and satisfy his burden of going forward (10 CCR sec. 2614.6) by stating he intends to rely on adverse witnesses (which are exempt from the filed testimony requirement), the less stringent requirement of “probable cause” to bring an action in the first instance would be effectively nullified. In other words, the CDI need not conduct

any independent examination or investigation before initiating a noncompliance proceeding since the CDI can make his prima facie case without his own evidence (i.e. Commissioner's examiners or analysts). The "probable cause" requirement would be effectively satisfied by the CDI's citation to the list of adverse witnesses he intends to call." The comment further suggests the manner in which the Department should conduct its investigations. (p. 8, line 8 through p. 9, line 6)

Response

The Department disagrees with the comment. The proposed amendment does not in any way amend or abridge Insurance Code sections 1858 or 1858.01. The proposed amendment does not affect those sections and simply has no bearing on either 1858 or 1858.01.

Comment

The proposed amendment seeks to implement an underground regulation because they interpret existing regulation 2614.13 to imply that which they are seeking to make explicit. (p.9, line 8 through p. 10, line 17)

Response

The Department disagrees with the comment. Because regulations are rules of general applicability, they apply to a wide range of persons or acts and thus cannot be a strict enumeration of rights and wrongs or perfectly delineate with a fine line the exact extent of the law in all possible situations. That is, even when not vague, they are subject to some interpretation. When an agency seeks to clarify a regulation through a rulemaking – that is, make what was implied explicit – it does not "seek to implement an undisclosed underground regulation." The Department desires consistent application of 2614.13. The Department believes that most bench officers have and will interpret 2614.13 consistent with the Department's interpretation. The Department has been made aware that not everyone will interpret the regulation at issue in the same way. Thus, in the interest of consistent application, the Department seeks to clarify and make explicit the intended rule.

Comment

The proposed amendment seeks to enable the Department or intervenor the ability to call any witness at hearing to provide oral testimony so long as they are not an "employee, agent, officer, or independent contractor." The comment provides background and discusses the existing regulations in support of this assertion. (p. 9, line 8 through p. 10, line 8)

Response

To the extent the comment is not specifically directed at the Commissioner's proposed regulations or to the procedures followed in proposing the regulations, no response is necessary. (Gov. Code section 11346.9.) To the extent the comment does address the proposed regulation, the Department disagrees. The proposed amendment does not in any way address, abridge, or amend the ability, or lack thereof, to call a witness. It only amends how a given witness may present testimony.

Comment

The proposed amendment is inconsistent with 2614.6's requirement that the Department present its evidence and witnesses first. This would permit a "trial by ambush" by which the Department can wait to provide testimony in support of its case-in-chief after a company has already provided a defense. (p. 10, lines 9-13)

Response

The Department disagrees with the comment. In noncompliance hearings it is the respondent's acts that are at issue and the Department is the investigating party. In most cases the witness is at far greater disposal to the respondent than to the Department. Thus, the evidentiary testimony at issue is just as available to the respondent as the Department, *if not more so*.

Further, the proposed amendment applies to all parties and maintains the existing general procedural scheme. The "action" is commenced when the Department serves a notice of noncompliance. (2614.2(a).) Subsequently, the "proceeding" is commenced when the Department files a request for hearing. (2614.2(b).) The proceeding includes pre-hearing actions, an evidentiary hearing, and post-hearing actions. Pre-hearing actions include discovery, exchange of witness lists, and prehearing conferences. (see generally 2614.8, 2614.10, and 2614.11.) The evidentiary hearing includes the presentation of oral evidence. (see generally 2614.17.) Post-hearing actions may include the production of further additional evidence, and includes the proposed decision. (see generally 2614.21 and 2614.24.)

Regarding alleged conflict with 2614.6(b), there is no conflict because that section applies to presentation of evidence at the evidentiary hearing. While the sharing of prepared testimony, pursuant to 2614.13 is not part of the evidentiary hearing. ("*Prepared direct testimony . . . shall be filed and served on all parties at least forty (40) business days before the first day of the evidentiary hearing.*" (emphasis added)). During the evidentiary hearing the Department has the burden of presenting its evidence and witnesses first. This is unaffected by the proposed amendment to 2614.13. The proposed amendment does not change the order of presentation of evidence at the evidentiary hearing and thus is not inconsistent with 2614.6(b).

The existing general procedural scheme protects respondents' fairness interests and is not impaired by the proposed amendment. The Department holds conferences with the respondent before or during hearings. (2614.1(a).) The ALJ has authority to eliminate delay and compel parties to resolve issues. (2614.1(b).) The Department provides respondent with a written notice which states in what manner and to what extent noncompliance is alleged to exist. (2614.2(a).) Respondent is afforded the opportunity to prepare a defense to any new charges. (2614.3.) Cases may be bifurcated to avoid prejudice or delay. (2614.4.) The Department has the burden of proof and of presenting its evidence and witnesses first. (2614.6.) Respondent is entitled to obtain the name and address of witness prior to hearing. (2614.8(a).) Respondent is entitled to statements of witnesses prior to hearing. (2614.8(a)(2).) Respondent is entitled to all relevant and admissible documents and reports prior to hearing. (2614.8(a)(3),(4).) Upon ruling of the ALJ the respondent is entitled, before hearing, to a clarification of issues, a ruling on the

identity and limitation of the number of witnesses, to object to proffers of evidence, to an exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing, and any other matters as shall promote the orderly and prompt conduct of the hearing. (2614.10.) Respondent is entitled to an exchange of information concerning witnesses – including a list setting forth the name of any person who will be offering testimony and a narrative statement of the general substance of the testimony that each witness is expected to give. (2614.11.) Within 30 days after the exchange described in 2614.11, any party who engages in the exchange may submit a supplemental witness list containing the name of any witness who will provide testimony on a subject to be covered by a witness designated by an adverse party to the exchange. (2614.12.) Respondent is entitled to present additional direct testimony. (2614.14.) Respondent is entitled to present rebuttal testimony. (2614.15.) Respondent is entitled to call and examine witnesses; introduce exhibits; cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; impeach any witness regardless of which party first called him or her; and to rebut evidence against him or her. (2614.17(b).) And finally, respondent is entitled to request the ALJ to limit oral testimony and to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (2614.17(f).) All of these procedural safeguards zealously protect and preserve fairness to all parties and are left untouched by the proposed amendment.

Comment

The proposed amendment is unclear because it contains undefined terms such as: “employee,” “agent,” “officer,” “director,” and “independent contractor.” (p. 11, lines 1-6)

Response

The Department disagrees with the comment. Although all words can be subjected to an academic exercise in parsing, the proposed amendment is a rule of general applicability and the general rules of interpretation apply. All of the language in the proposed text is generally familiar to those who are directly affected by it.

Comment

The proposed amendment is unclear because it provides no guidance as to what types of witnesses can be called. (p. 11, lines 7-12)

Response

The Department disagrees with the comment. The proposed amendment has no bearing on what witnesses can or cannot be called. The proposed amendment neither addresses nor makes any change to existing law regarding whether a party can or cannot call a witness.

Comments of Kimberley Dellinger Dunn on behalf of the Personal Insurance Federation of California

Comment

Introductory comments and background

Response

This portion of the comment is not specifically directed at the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Comment

The purpose of Prepared Testimony is to provide prehearing evaluation of complex testimony and to allow time for motions to strike. Excluding some witnesses from this process is contrary to its goals.

Response

The Department agrees with the comment insofar as it states the general purpose of the "Prepared Testimony" regulation (2614.13). However the Department disagrees with the comment insofar as it objects to the proposed amendment. The proposed amendment, which applies to all parties in a proceeding, preserves the purposes of the general regulatory procedural scheme by preventing the application of Prepared Testimony in instances where it would actually deter an efficient proceeding. As provided in the Initial Statement of Reasons and previous comments and responses, Prepared Testimony is intended for witnesses under the party's control, in which case the orderly presentation of the evidence is possible. When the witness is adverse, the orderly presentation of evidence is impossible and the benefit of pre-hearing testimony is lost. The extra step of gathering and presenting it is futile. Relieving all parties of this futility improves the efficiency of the hearing. The testimonial evidence is still presented first, at the evidentiary hearing, by the Department. The proposed amendment does not change anything in this respect. The regulation at issue contemplates technical and/or complex testimony coming from parties' expert witnesses. This is unaffected by the proposed amendment.

Comment

The proposed amendment is inconsistent with 2614.6's requirement that the Department present its evidence and witnesses first.

Response

The comment is a repeat from the prior commenter – Steve Weinstein. The Department disagrees with the comment. Please see the lengthy response beginning near the top of page 6.

Comments of Christian John Rataj, Esq., and Milo Pearson on behalf of both the National Association of Mutual Insurance Companies and the Pacific Association of Domestic Insurance Companies

Comment

Introductory comments

Response

This portion of the comment is not specifically directed at the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Comment

The proposed amendment creates an unfair advantage for the Department because it would allow the Department to avoid disclosing important aspects of their case and would impede the insurance company from being able to properly prepare their witnesses and respond to the Department's or an Intervenor's arguments.

Response

The comment is a repeat from the comments of Steve Weinstein. The Department disagrees with the comment. Please see the responses beginning near the top of page 2 and near the top of page 6.

Comments of Jeff Fuller on behalf of the Association of California Insurance Companies, and unsigned written comments of the Association of California Insurance Companies
(The oral comments essentially repeat the written comments. The order of presentation below follows the written comments.)

Comment

Introductory comments and background

Response

This portion of the comment is not specifically directed at the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Comment

"Exempting the department from the requirement to submit prepared direct testimony forces an insurer to defend itself with its hands tied behind its back because the insurer cannot know or prepare for the evidence that it will confront in the noncompliance hearing."

Response

The Department disagrees with the comment. The proposed amendment, which applies to all parties in a proceeding, preserves the procedural scheme's protection of fairness and allows for liberal sharing of issues, evidence, and witnesses before the evidentiary hearing. As provided in responses above, the notice provisions, discovery provisions, prehearing conference provisions, and witness information sharing provisions are all unaffected by the proposed amendment and ensure liberal notice, disclosure, rights, and fairness for all parties.

Comment

"The efficiency and fairness achieved by the requirement for prepared direct testimony would be thwarted by the proposed amendment's exclusion of certain kinds of testimony from the requirement."

Response

The Department disagrees with the comment. The proposed amendment, which applies to all parties, preserves the purposes of the general regulatory procedural scheme by preventing the application of Prepared Testimony in instances where it would actually

deter an efficient proceeding. As provided in the Initial Statement of Reasons and responses to similar comments above, Prepared Testimony is intended for witnesses under the party's control, in which case the orderly presentation of the evidence is possible. When the witness is adverse, the orderly presentation of evidence is impossible and the benefit of pre-hearing testimony is lost. The extra step of gathering and presenting it is futile. Relieving all parties of this futility improves the efficiency of the hearing. The testimonial evidence is still presented first, at the evidentiary hearing, by the Department. The proposed amendment does not change anything in this respect. The regulation at issue contemplates technical and/or complex testimony coming from parties' expert witnesses. This is unaffected by the proposed amendment.

Comment

“In undertaking a noncompliance hearing, the Department of Insurance has presumably already obtained evidence of a violation. That evidence should suffice to test the department's accusation and, if properly disclosed as prepared direct testimony, enable an insurer to know specifically the nature of the evidence against it and to have an opportunity to refute that evidence. The department should have no need for the regulatory amendment proposed here if the preparation of its case has been accomplished thoroughly by the department's professional staff.”

Response

The Department disagrees with the comment. To the extent the comment addresses how the Department conducts an investigation, the comment is misplaced because the proposed amendment does not have any bearing on how the Department conducts an investigation or makes a probable cause determination. The precise manner and timing of presenting testimonial evidence is not a consideration when conducting an investigation. To the extent the comment argues that the proposed amendment will deprive a respondent of notice and an opportunity to be heard – the basic notions of Due Process – the Department disagrees. As provided in previous responses, the regulatory procedural scheme fully satisfies the APA's minimum Due Process requirements and provides liberal notice, disclosure, fairness and rights to all parties.

Comments of Steven Suchil on behalf of the American Insurance Association

Comment

Introductory remarks and background

Response

This portion of the comment either expresses support for, or is not specifically directed at, the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Comment

A disagreeable bench ruling is not sufficient to show necessity and is an unwise basis on which to promulgate a rulemaking. Also, no information has been provided regarding the original implicit intent of the prepared direct testimony requirement.

Response

The Department disagrees with the comment. Although the Department does not believe the existing regulation is objectively ambiguous, the proposed amendment ensures that the regulation is consistently applied from bench officer to bench officer by removing potential subjective ambiguity. This necessity was created when the Department was made aware of an interpretation which has great potential to conflict with previous and future interpretations of the same regulation.

Comment

The proposed amendment places insurers at a disadvantage because the Prepared Testimony requirement allows parties sufficient time to review the testimony to get ready for the hearing.

Response

The Department disagrees with the comment. The proposed amendment applies to all parties. Although it is within the Department's authority to completely delete the Prepared Testimony requirement, the Department believes that it is in all parties' best interests to provide written pre-filed Prepared Testimony for parties' expert witnesses and percipient witnesses within their control in advance of the evidentiary hearing. It is parties' expert witness testimony which must be disclosed in order for the opposing party to prepare cross-examination and marshal rebuttal evidence. This is inherent within section 2614.13. It would be a disadvantage to hear a party's technical expert testimony for the first time at the evidentiary hearing. The fairness provided by disclosing this testimony in writing before the hearing is preserved by this rulemaking.

Comments of Pamela Pressley and Carmen Aguado on behalf of Consumer Watchdog
(The oral and written comments essentially repeat each other. The order of presentation below follows the written comments.)

Comment

Introduction and background

Response

This portion of the comment either expresses support for, or is not specifically directed at, the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Comment

Requiring prepared testimony from adverse witnesses is tantamount to a rule of exclusion of key evidence in the control of insurers. It is far-fetched to suppose that the Commissioner intended the rule to operate as a de facto rule of exclusion that would protect insurance companies and hobble the Department and intervenors in their enforcement efforts.

Response

This portion of the comment either expresses support for, or is not specifically directed at, the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Comment

The Commissioner's amendment clarifies that parties are allowed to present oral testimony from witnesses in the control of opposing parties. Fundamental fairness and due process require that intervenors and the Department have the ability to present evidence of insurers' wrongdoing through individuals who have the best knowledge of insurers' past practices, and that ability would be eliminated if they were required to present prepared written testimony of adverse witnesses in the control of respondent insurers.

Response

This portion of the comment either expresses support for, or is not specifically directed at, the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Comment

In a previous administrative proceeding, the ALJ did not require the parties to file pre-filed direct written testimony of any of the adverse witnesses they intended to call at the hearing. All counsel in that matter (including an above commenter) agreed to that procedure and did not raise any due process concerns.

Response

This portion of the comment either expresses support for, or is not specifically directed at, the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Comment

Other provisions of the Commissioner's regulations provide for oral testimony, extensive cross-examination rights, and further due process fairness protections.

Response

This portion of the comment either expresses support for, or is not specifically directed at, the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Comment

The Commissioner's clarification is consistent with the procedural rules applied to adverse witness testimony in civil trials.

Response

This portion of the comment either expresses support for, or is not specifically directed at, the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Comment

The comment proposes additional language to make the proposed regulation's intent more explicit.

Response

This portion of the comment either expresses support for, or is not specifically directed at, the Commissioner's proposed regulations or to the procedures followed in proposing

the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)
However, the Department believes that the current proposed language is clear and thus is
going forward as originally noticed.

